77-972

No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

JERRY SCOTT MORGAN, Petitioner

VS.

THE STATE OF TEXAS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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The Petitioner Jerry Scott Morgan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals entered in this proceeding on November 2, 1977.

OPINION

The opinion of the Texas Court of Criminal Appeals on original submission of the cause appears in the Appendix hereof. A motion for rehearing was filed and overruled without written opinion on November 30, 1977. Appendix to be labeled Exhibit A.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered and delivered on November 2, 1977. A timely petition for rehearing was denied by order of the Texas Court of Criminal Appeals on November 30, 1977. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

1. Whether or not a Defendant in a state Criminal case can go behind the "four corners" of a search warrant affidavit and show that some of the allegations are not true and therefore it lacks probable cause.

2. If such attack, is permissible, what must the proof show, before the evidence will be suppressed.

STATEMENT OF THE CASE

Petitioner was convicted of bookmaking and sentenced to five years in the penitentiary. Evidence of a very incriminating nature was seized by a search warrant. Without this evidence, Petitioner could not have been convicted of any crime.

The affidavit stated that affiants had received information from an unknown informant that Petitioner was taking bets at an address other than the one searched and that a credible and reliable informer told affiants that Petitioner was taking bets over a phone number located on the searched premises.

Affiants placed the searched premises under surveillance from November 11, 1974

to November 15, 1974.

The affidavit stated that Petitioner would arrive at the searched premises between 2:30 and 3:30 p.m. and would leave between 6:30 and 7:30 p.m. and that these were the hours normally used by Tarrant County bookmakers to give information and take bets on football games and that Petitioner was seen to enter and leave the searched premises over the four day period of surveillance during these hours normally kept by bookmakers.

There was no pre-trial supression motion. It was at the trial, Petitioner first learned the truth behind the affidavit.

The affiant Ashley testified on cross-examination that he saw the Petitioner enter the searched premises only one time and that was on the 14th. He did not see him leave. Affiant Cashion said the same thing. Neither saw him there except once and neither ever saw him leave. This evidence is not controverted and comes from the affiants' own testimony on cross-examination at the trial on the merits. Officer Cashion testified that he was working 9 to 5 on the days in question. The record reflects the same as to Officer Ashley.

After Petitioner made a motion to the trial court to withdraw the case from the jury, both sides had closed, but before the case went to the jury. The trial court overruled the motion and Petitioner excepted to this action. This point was preserved and was briefed and argued to the Court of Criminal Appeals of Texas. It was overruled as per the attached opinions.

REASONS FOR GRANTING THE WRIT

1. Because of the material mis-representations by the affiants the search warrant affidavit did not state probable

cause for the issuance of the warrant. No search warrant shall issue unless it is supported by oath or affirmation stating probable cause. U.S. Const. 4th Amend.

2. The affidavit should not be mere form, but should rest on facts being true. Otherwise, the protection of the 4th Amendment becomes a farce and a question of form only.

3. There must be protection given where the facts supporting probable cause are intentionally mis-presented and the proof thereof is clear and convincing, such as here, from the affiants own sworn testimony at the trial. Otherwise, there is no protection, but only slavery to the form of words, not truth. In such cases, where the proof is clear and convincing, the Courts should look behind the "four corners" of the affidavit to establish the existence of lack of probable cause.

4. Although, the Supreme Court has not spoken on the subject, the law in the lower Federal Courts interpreting the 4th Amendment is clear that the Courts will look behind the affidavit. The question that is unclear, is what must be first proven, before a Federal Court will look behind the affidavit.

The Seventh Circuit allows a hearing if the defendant shows any mispresentation of a material fact or any intentional mispresentation whether material or not. United States v. Smith, 499 F.2d 251, 255. The Ninth Circuit requires the defendant to make a substantial showing of a false-hood before looking behind the affidavit. United States v. Harris, 501 F.2d 1, 5-6. The First Circuit will allow suppression if there was any intentional mispresentation. United States v. Belcufine, 508 F.2d, 58 62-63. The law is not clear in the Fifth Circuit due to a recent granting of a motion for rehearing in the U.S. v.

Astroft 564 F2d 199, 556 F.2d 1369. Previously the holdings of that Circuit seemed to indicate that a negligent misrepresentation would not require suppression. United States v. Thomas, 489 F.2d 664,670-71. All Federal Courts seem to agree that an intentional misrepresentation would require suppression.

5. The Courts of Texas will not look past the "four corners" of the affidavit in any instance. See page 10 of the Appendix (Exhibit A). The Court of Criminal Appeals adhered to its former holding in this case.

6. The Fourth Amendment's right of privacy is enforceable against the States through the due process clause of the 14th Amendment by the same sanction of exclusion as used against the Federal Government. Mapp v. Ohio, 367 US 643, 6 Led 2d 1081, 81 S. Ct 1684.

7. Under the Fourth Amendment, due process would be denied the Petitioner unless he be allowed to look past the affidavit to the truth. The truth shows a complete lack of probable cause. The testimony of the affiants was clear and convincing that they only saw the Petitioner go into the apartment once; never saw him leave and did not work past 5:30 p.m. on any day. The statements of the affidavit that Petitioner was seen entering between the hours of 2:30 and 3:30 p.m. and leaving between 5:30 and 7:30 p.m. could not be true because they never saw him leave. They never were working past 5:30 p.m. so they could not have seen him during the bookmaking hours as the affidavit said. These could not be said to be negligent mistakes but an intentional mispresentation that went to the heart of the alleged probable cause.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January 1978 three copies of the petition for writ of certiorari were mailed, postage prepaid to the Honorable John Hill, Attorney General of the State of Texas. Supreme Court Building, Austin, Texas 78701, Counsel for the Respondent. I further certify that all parties required to be served have been served.

COUNSEL FOR PETITIONER

EXHIBIT A

JERRY SCOTT MORGAN, Appellant

No. 52, 704 Vs. Appeal from Tarrant County Texas

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for the offense of gambling promotion. Punishment was assessed at five (5) years' imprisonment.

Appellant urges six grounds of error. They include challenges to the sufficiency of the evidence, an assertion that the indictment fails to specifically name whom appellant received a bet from, and a claim that the search warrant was defective for material misrepresentations. He further avers that the search warrant does not specify the place to be searched, and does not give sufficient underlying circumstances to give rise to the conclusion the contraband was where it was alleged to be. He finally contends that the court failed to submit a charge as to a lesser included offense.

The indictment in the present case alleged that appellant "on or about the 15th day of November 1974 did then and there knowingly and intentionally receive and record a bet and offer to bet from a person known to the Grand Jury only as '7020' for the amount of

$150.00, of the value of one hundred and fifty dollars, on a football game . . . ." Appellant contends that the evidence is insufficient to show that he received and recorded a bet; that the bet and offer were from a person known as 7020; that the amount of the bet was $150.00; and that the bet was on a football game.

Glen Ashley of the Tarrant County Organized Crime Unit testified that on November 15, 1974 several officers and he executed a search warrant on 2129 Hendricks, #130, in Arlington. He had conducted surveillance of the apartment for four days and seen the appellant coming and going. The officers entered after announcing who they were and saw appellant seated behind a dining room table and saw another man seated on a couch. Appellant was searched by Ashley and a "bettor's list" and "settle-up" sheet were found in his billfold. These items were introduced into evidence as State's Exhibit #1 and #2.

T. D. Cashion of the same Tarrant County crime unit stated that when they entered the apartment he saw appellant talking on the telephone at the dining room table. "Line sheets," introduced as State's Exhibits #5, #6, and #9, and "bet slips," introduced as State's Exhibits #7 and #8, were found in front of appellant at the table by Cashion. Appellant's brother-in-law had the phone listed in his name.

D. R. Smith of the Tarrant County crime unit stated that upon entering the apartment he saw appellant talking on the

phone. Appellant had a pen writing on a pad of paper and line sheet. He identified State's Exhibits #5, #6, #7, #8 and #9 as items laying on the table in front of appellant on the dining room table in the apartment. Appellant was writing on State's Exhibit #7. He was arrested and the phone rang ten to twelve times in the next forty-five minutes the officers stayed in the apartment. State's Exhibit #7 read as follows:

#7020

	WON	LOST
Purdue +21		
Alabama -25 1/2 150 (P)		
Baylor (P)		

Exhibit #7 was a bet slip for a parlay bet from money by bettor #7020 on a football game.

John Lowe testified that he had been granted immunity after being a co-indictee of appellant. He said he lived in apartment #130 with Larry Sprott, the brother-in-law of appellant. Appellant was speaking on the phone as the officers arrived and had a pen in his hand moving it around. Papers on the table were taken by the officers. State's Exhibits #5 through #9 appeared to be the kind taken from the table.

Assistant district attorney Greg Pipes testified he presented appellant's case before the grand jury. He stated he used

all pieces of information available to determine the identity of #7020 and could not.

The foregoing evidence is sufficient to show appellant received and recorded a bet and offer to bet. Appellant was observed by the officers who entered the apartment to be seated at the dining room table talking on the telephone and writing with a pen upon a piece of paper. The paper he wrote on was identified by Officer Smith and was stated to be a "bet slip." Smith explained that the bet slip showed the three football teams, Purdue, Baylor and Alabama were bet on. Purdue had a twenty-one point spread, Alabama minus twenty-five and Baylor was a "pick-em." One hundred fifty dollars was placed on the bet. The circled bet indicated it was a parlay bet. Smith had four years' experience on the organized crime unit and had investigated bookmaking activities and executed warrants and seized paraphernalia and examined it on previous occasions.

State's Exhibits #1 and #2, a bettor's list and "settle up" sheet, were found in appellant's billfold on his person. State's Exhibits #5 and #6 were found on the dining room table in front of appellant and were shown to be line sheets. Smith explained they showed opposing football teams and the point spread between them for a week's scheduled games. State's Exhibit #1 revealed #7001 through #7020 and respective initials beside each number. We observe that appellant's possession of the bettor's list and settle up sheet on his person was evidence itself to show that he had

knowledge and was party to some system of bookmaking. Herndon v. State, 543 S.W.2d 109 (Tex.Cr.App. 1976); Davis v. State, 239 S.W.2d 109 (Tex.Cr.App. 1951); Smith v. State, 491 S.W.2d 924 (Tex.Cr.App. 1973).

The #7020 was on State's Exhibit #7, which appellant was writing on when he was on the phone at the time the officers arrived. The number was at the top of State's Exhibit #7 and Officer Smith stated it represented a code name for the bettor. State's Exhibit #1 had #7020 on it with the initials B.S. beside it. Smith said the initials identified the bettor's identity to the bookmaker and the paper was a bettor's list.

Smith, testifying as an expert, stated that the money placed on the bet was $150.00 on State's Exhibit #7 and it was a parlay bet. This meant that all three teams, Baylor, Purdue and Alabama had to win the point spread to win the parlay bet. Smith identified the 150 as meaning $150.00 and said it was that amount as gamblers never take a bet under $10.00.

State's Exhibit #5 shows a weekly football schedule with Baylor, Alabama and Purdue on it for the week of November 18, 1974 and was identified as a line sheet. The sheet was found on the dining room table in front of the appellant. The same odds for the point spread are found on State's Exhibit #5 beside the three teams as in State's Exhibit #7, and Smith noted this correspondence. This evidence showed that the bet was on a football game.

We conclude that the foregoing evidence viewed in the light most favorable to the jury's verdict is sufficient to sustain the conviction. Herndon v. State, supra.

Appellant's ground of error is over-ruled.

Appellant next contends that the trial court erred in over-ruling his motion to quash the indictment. He avers that it failed to name or sufficiently identify a person with whom the indictment charged he knowingly and intentionally received a bet and offered to bet. The indictment read:

> ". . . JERRY SCOTT MORGAN hereinafter called Defendant, in the County of Tarrant and State aforesaid, on or about the 15th day of November 1974, did then and there knowingly and intentionally receive and record a bet and offer to bet from a person known to the Grand Jury only as '7020' for the amount of $150.00, of the value of one hundred and fifty dollars, on a football game . . . ."

We observe that Article 21.07, Vernon's Ann.C.C.P., states:

> "In alleging the name of the defendant, or of any other person necessary to be stated in the indictment, it shall be sufficient to state one or more of the initials of the Christian name and the surname. When a person is known by two or more names, it shall be sufficient to state either name. When the name of the person is unknown to the grand jury, that fact shall be stated, and if it be the accused, a reasonably accurate description of him shall be given in the indictment."
> (Emphasis supplied.)

At the hearing on the motion to quash the appellant offered no evidence or authority but argued that there was no allegation of what diligence was used to ascertain the identity of the person represented. In the absence of testimony on the matter, the court overruled the motion. We perceive no error.

It is observed that later assistant district attorney Greg Pipes testified he presented appellant's case to the grand jury that indioted him. He identified the various State's exhibits containing the #7020 and related that these exhibits were made available to the grand jurors, that he was the only person to appear before the grand jury in connection with the case, that he had investigated the case, talked with police officers, had the police report, etc., and that he left the entire file with the grand jurors. He related that he and the grand jury used all the information available, but were unable to determine the identity of the person whose code name was "7020."

There was no other testimony offered on the subject matter. Where nothing is developed in a trial to suggest that investigation by the grand jury could have ascertained the identity of the person with whom the defendant recorded a bet or offered to bet other than a designation such as "7020," there is a prima facie showing that identity of such person was known to the grand jury only as "7020," thereby supporting such averment in the question. This is especially true when the whole case shows that if the grand jury had been in possession of all the evidence developed on the trial it still could not have determined the identity of the person with whom a defendant recorded a

bet or offered to bet. Cunningham v. State, 484 S.W.2d 906 (Tex.Cr.App. 1972), and cases there cited; Ansley v. State, 468 S.W.2d 862 (Tex.Cr.App. 1971).

There is no merit to appellant's contention.

Appellant's ground of error is overruled.

Appellant also contends the court committed reversible error in denying the motion for instructed verdict of "not guilty" at the conclusion of the guilt stage of the trial, or in the alternative, to grant a mistrial because of material misrepresentations made by the officers-affiants in their search warrant affidavit. This matter was not raised on the pre-trial hearing on the motion to suppress. Appellant calls attention to his "Motion to Withdraw Case from Jury," which he urged at the guilt stage of trial and which advanced to the trial court the matter now urged on appeal, but which was overruled. Appellant argues that the officers-affiants Cashion and Ashley stated in the search warrant affidavit that they had good reason to believe and did believe that the appellant had charge and control of the apartment in question, and notes their trial testimony that prior to the surveillance they learned the apartment was leased to James Larry Sprott (appellant's brother-in-law) and John Elwood Lowe. He directs our attention also to the statement in the affidavit that the surveillance revealed that appellant would arrive at the apartment in question between 2:30 and 3:30 p.m. and would leave between 6:30 and 7:30 p.m., which are normal hours used by bookmakers in Tarrant County.

He then notes the testimony of Cashion and Ashley that each had only seen the appellant enter the apartment complex on one occasion and had never seen him leave. He contends that the material misrepresentations render the search warrant affidavit void and that since all the incriminating evidence was obtained by virtue of the execution of the search warrant, the trial court should have instructed a verdict of "not guilty."

The fact that a lease is in the name of a certain individual or individuals does not mean that another person cannot have charge and control of an apartment. Ashley testified that from November 11th through November 14th the apartment complex was under surveillance, and that during such time he saw the appellant coming and going and that appellant's automobile was seen at the apartment complex on November 12, 13 and 14th. On cross-examination he stated he had only seen appellant on November 14th when we arrived between 2:30 and 3:30 p.m. and that he (Ashley) left the surveillance between 5:00 and 5:30 p.m. He did not testify nor was he asked whether the appellant was still in the apartment complex at the time he departed. Cashion testified he saw appellant enter the apartment complex about 4:30 p.m. on November 13, and he left the surveillance shortly thereafter while appellant's car in which he arrived was still there. On November 14th, he relieved Ashley on surveillance about 3:30 p.m., which was about the time appellant arrived and entered the apartment in question. He related Ashley stayed awhile after appellant's arrival. Cashion related he left the surveillance before the appellant

left the area. While the trial testimony does not support the statement in the affidavit that the appellant would leave the apartment between 6:30 and 7:30 p.m., the trial testimony is not as inconsistent with the affidavit as appellant claims.

It is settled that in determining the sufficiency of a search warrant affidavit to reflect probable cause we are limited to the four corners of the affidavit. Article I, §9, Texas Constitution; Article 18.01, Vernon's Ann.C.C.p.; Lopez v. State, 535 S.W.2d 643 (Tex.Cr.App. 1976); Davajol v. State, 529 S.W.2d 517 (Tex.Cr.App. 1976); Riojas v. State, 530 S.W.2d 298 (Tex.Cr.App. 1975). This court will not look behind the allegations of a search warrant affidavit. Baines v. State, 520 S.W.2d 401 (Tex.Cr.App. 1975); Phenix v. State, 488 S.W.2d 759 (Tex.Cr. App. 1972). We adhere to these holdings. The court did not err in denying the motion for an instructed verdict. Appellant's contention is overruled.

In passing, we observe in federal court it has been held that unintentional misrepresentations in a search warrant affidavit will not invalidate the search warrant unless the affidavit, viewed without the erroneous statements, is insufficient to constitute probable cause. If, however, the misrepresentations are shown to be intentional, the affidavit will be invalid regardless of whether the error is material to a showing of probable cause. United States v. Parks, 531 F.2d 754 (5th Cir. 1976); United States v. Hunt, 496 F.2d 888 (5th Cir. 1974); United States v. Thomas, 489 F.2d 664 (5th Cir. 1973), cert. denied, 423 U.S. 844 (1975); United States v. Morris, 477 F.2d 547 (5th Cir. 1973),

cert. denied, 414 U.S. 852 (1973); United States v. Jones, 475 F.2d 723 (5th Cir. 1973), cert. denied, 414 U.S. 841 (1973); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971), cert. denied, 405 U.S. 934 (1972).

Even if we were to follow the federal rule, no reversible error would be reflected. There is no showing the misrepresentations were intentional, and even without the statements in question, the affidavit would still reflect probable cause.

Appellant's ground of error is overruled.

Appellant next complains that the trial court erred in overruling his motion to suppress the search warrant as the sworn affidavit upon which the warrant is based does not specify with requisite certainty the place to be searched, and thus does not reflect probable cause.

He bases his premise upon the fact that the search warrant lists the address to be searched as 2129 Hendricks Drive, apartment #130, in one paragraph and mentions in another paragraph the address of 2219 Parkhill, Arlington.

Testimony revealed that the officers executed the warrant at 2129 Hendricks Drive, apartment #130. The affidavit first mentions 2129 Hendricks, apartment #130, and thereafter makes reference to apartment #130 at that address seven more times. There is a lengthy physical description of this address setting forth the name of the apartment complex, that it is a two story, eight unit combination wood and stucco

structure brown in color, and that it has a brown composition roof. The exact location of apartment #130 was given as being on the west side of the complex two doors from the south end. It was stated a partition partially blocked the door's view, and the door was described as brown with white numerals 130 on it. The affidavit then stated there was good reason to believe that various described gambling paraphernalia would be found there.

The only mention of another address in the affidavit was that appellant had previously on October 20, 1974 been revealed by an unknown informant to have bookmaking activities at a phone number registered to 2219 Parkhill, Arlington, Texas. This reference apparently was placed in the affidavit to bolster the conclusion that appellant had previous, recent gambling activities and was not intended to be relied upon as the address to be searched. No description was given of the 2219 Parkhill premises in any detail whatsoever as was given the address at 2129 Hendricks, apartment #130.

A search warrant affidavit must be viewed in its entirety. The test for determining sufficiency of a search warrant's description of the place to be searched is whether the description is sufficient to apprise officers of the place where they are to conduct the search and where the warrant describes a multi-unit dwelling, the description must contain sufficient guidance to apprise the officers of the particular unit to be searched. Tyra v. State, 496 S.W.2d 75 (Tex.Cr.App. 1973); Haynes v. State, 475 S.W.2d 739 (Tex.Cr.App. 1972).

The description should be of sufficient definiteness to enable the officer executing the warrant to locate the property and distinguish it from other places in the community. Reynolds v. State, 506 S.W.2d 864 (Tex.Cr.App. 1974); Ex parte Flores, 452 S.W.2d 443 (Tex.Cr.App. 1970).

We conclude that the affidavit and warrant were sufficiently detailed to inform the officers of the location of the apartment they were to search. The context of the warrant read as a whole does not lead to the conclusion that the other address mentioned was one that the officers were to search.

Appellant's ground of error is overruled.

Appellant also contends that the search warrant was defective for failure to reflect adequate probable cause. He avers that there are not sufficient underlying circumstances presented by affidavit to justify the conclusion that appellant was in possession of the gambling paraphernalia alleged at the time application for search warrant was made.

The search warrant affidavit contained information that appellant was taking bets and wages for money over the telephone number 469-8118. The informant stated appellant gave him this number to place a bet and that the informant had placed numerous bets and wagers for money on college and professional football games over that number with appellant. The last call had been the week of November 11, 1974. The search was conducted November 15, 1974. The appellant would meet the informant

after football games were played, either on Tuesday or Wednesday in order to settle the bets. Appellant would pay the informant, or the informant pay appellant according to who won the bets.

The officers found through investigation that the phone number 469-8118 was located at 2129 Hendricks, apartment #130. Surveillance was conducted there on November 11, 1974 and appellant was seen to arrive between 2:30 and 3:30 p.m. and did not leave before the surveillance was ended. The officers stated the normal bookmaking hours in Tarrant County.

The informant was believed reliable and credible as he had supplied the affiants with true and correct information in the past on three other occasions leading to the arrest of three subjects for felony bookmaking.

The affiants stated they had thirteen years' combined experience as peace officers and two years devoted to investigation of gambling activities. Their experience there and through seminars and schools on gambling activity led them to the opinion that appellant conducted a bookmaking operation at the location and that such operation had to have records, implements and gambling paraphernalia at the premises to facilitate operation.

The second prong of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), was satisfied by information that the informant was reliable and credible through three prior experiences resulting in successful arrests. Cf.

Morgan v. State, 516 S.W.2d 188 (Tex.Cr. App. 1974); Hegdal v. State, 488 S.W.2d 782 (Tex.Cr.App. 1972); Barnes v. State, 504 S.W.2d 450 (Tex.Cr. App. 1974). This was further bolstered by the informant's declaration against penal interest that he had placed the bet with appellant. Abercrombie v. State, 528 S.W.2d 578 (Tex.Cr.App. 1975).

Also the informant's tip plus independent observations by the affiants were sufficient to satisfy the requirements of probable cause. See Rivas v. State, 506 S.W.2d 233 (Tex.Cr.App. 1974); Keeble v. State, 506 S.W.2d 897 (Tex.Cr.App. 1974); Polanco v. State, 475 S.W.2d 763 (Tex.Cr. App. 1972); Gonzales v. Beto, 425 F.2d 963 (5th Cir. 1970). See also Bruiton v. State, 519 S.W.2d 467 (Tex.Cr.App. 1975).

As to the first prong of Aguilar, appellant contends that the affidavit does not reflect that the informer personally observed bet slips, line sheets or other bookmaking equipment nor shows that such information was reliably obtained. The affidavit also shows that the informer stated the appellant was accepting wagers over certain telephone numbers and the informer had placed several wagers with the appellant over the telephone the last being the week beginning four days before the affidavit executed and the warrant issued. While the affidavit does not reflect personal observations of the informer as to bookmaking equipment as bet slips, line sheets, etc., the State urges that the existence of the same is necessarily inferred from the fact that it is shown that wagers on sporting events are being accepted over the telephone as such equipment is common to such bookmaking

operation by telephone.

In Lopez v. State, 535 S.W.2d 643, 647 (Tex.Cr.App. 1976), this court stated:

> ". . . (a) magistrate, in assessing probable cause, may draw inferences from the facts, Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367 92 L.Ed. 436 (1948), and probable cause exists when the facts and circumstances shown in the affidavit would warrant a man of resonable caution in the belief that the items to be seized were in the stated place, Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)."

In Lopez, a murder case, it was held that probable cause that four tire jacks were located in a certain apartment was established where a named informer who lived across the street from the apartment observed four men in bloodstained clothing remove four bloody bumper jacks from an automobile, the affiant swearing that the car belonged to the person who lived in the apartment and that the victim had been beaten to death by blunt instruments resembling bumper jacks. Although there was no recitation in the affidavit that the instruments were seen in the apartment nor was it stated where the informer was when he made his observations, it was held that from a reading of the affidavit a"reasonable inference" could be drawn that items were located in the apartment.

In United States v. Mulligan, 488 F.2d 732 (9th Cir. 1973), the Court said:

". . . Although there was no direct evidence that any evidence from the burglary was inside Dinsio's residence, there was sufficient evidence from which the magistrate could use his common sense to infer that the loot and tools, if not buried, were probably in the house. United States v. Ventresca, supra, 380 U.S. at 108, 85 S.Ct. 741.
* * *

"Because 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, 'we conclude that the affidavit contained a sufficient constitutional basis for a finding of probable cause."

In United States v. Lucarz, 430 F.2d 1051 (9th Cir. 1970), the search warrant affidavit, among other things, stated a male postal employee (Lucarz) had received custody of a mail pouch and later reported it to be cut and the mail inside missing and that he had been absent from the office for thirty-five minutes on the day in question. The court concluded the affidavit demonstrated theft of matters one would expect to be hidden in a residence. It reflected that appellant had the time to take the materials to his home but not enough time to seek a more unusual hiding place. The Court then wrote:

"The situation here does not differ markedly from other cases wherein this court and others, albeit usually without discussion, have upheld searches although the nexus between the items to be seized and the place to be searched rested not on direct observation, as in the normal search-and-seizure case, but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property." (Authorities cited not listed.)

See and cf. Vessels v. Estelle, 376 F.Supp. 1303 affirmed 494 F.2d 1295, cert. denied, 419 U.S. 969; United States v. LaVecchia, 513 F.2d 1210 (2nd Cir. 1975); Gonzales v. Beto, 425 F.2d 963 (5th Cir. 1970), cert. denied 400 U.S. 928.

It is well established that an affidavit for a search warrant must be interpreted in a common sense and realistic fashion. United States v. Ventresca, 380 U.S. 103, 85 S.Ct. 741, 13 L.ed.2d 684 (1965), United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). Although the informer in the instant case did not relate that he had personally observed the items designated to be seized, he did state the appellant was accepting wagers over certain telephone numbers and that he had recently placed several wagers with the appellant over such telephones. He further related that he would meet

appellant to settle their betting accounts on Tuesdays or Wednesdays. This was sufficient to establish the probability that appellant was engaging in a book-making operation. The affiant further checked and determined that the telephone numbers given were listed to the appellant at 2129 Hendricks, apartment #130. Given this information, the nature of the crime, the common knowledge that a bookmaking operation involves the use of bet slips, line sheets, settlement sheets, telephones, etc., the magistrate could use his common sense in inferring that these items were probably at the address in question.

Our determination that these facts are sufficient to establish probable cause is guided by the admonition that if "in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." United States v. Ventresca, supra, 380 U.S. at p. 109, 85 S.Ct. at p. 746.

The search warrant affidavit sufficiently reflected probable cause. Appellant's contentions are overruled.

Appellant in the final ground of error in his voluminous sixty-five page brief states that the trial court committed reversible error in failing to include an appropriate instruction in the court's main charge at the guilt stage of the trial on "possession of gambling paraphernalia." He contends that such was a lesser included offense of gambling promotion, raised by

the evidence, and should have been submitted in the charge.

Under, Article 37.09(1)., Vernon's Ann. C.C.P., an offense is a lesser included offense if it is established by proof of the same or less than all the facts required to establish the commission of the offense. See Sutton v. State, 548 S.W.2d 697 (Tex.Cr.App. 1977); Jones v. State, 532 S.W.2d 596 (Tex.Cr.App. 1975); Day v. State, 532 S.W.2d 302 (Tex.Cr.App. 1975); Hazel v. State, 534 S.W.2d 698 (Tex.Cr.App. 1976); Raven v. State, 533 S.W.2d 733 (Tex.Cr.App. 1976).

A lesser included offense is not necessarily proved merely because the evidence at trial may establish more than one related offense. We noted on rehearing in Graves v. State. 539 S.W.2d 890 (Tex.Cr.App. 1976), that:

> "The restrictive effect of the word 'required' in Art. 37.09(1) cannot be ignored. In applying the test one does not examine what the proof showed in establishing the offense charged; rather one must look to what facts in the proof were required to establish the offense charge. The broader reading of the statute would render any offense incidentally proven in the course of trial a lesser included offense, and authorize its submission to the jury.
> * * *
>
> "Such a broad reading of Art. 37.09(1) is impermissible. . . ."

The elements of gambling promotion as defined in V.T.C.A., Penal Code, §47.03(a)(2), are: (1) a person (2) intentionally or knowingly (3) receives, records or forwards a bet or offer to bet.

The elements of the offense of possession of gambling paraphernalia as defined in V.T.C.A., Penal Code, §47.07, are: (1) a person (2) with intent to further gambling (3) knowingly (4) owns, manufactures, transfers commercially or possesses (5) gambling paraphernalia.

"Gambling Paraphernalia" is defined in V.T.C.A., Penal Code, §47.01, as "any book", instrument, or apparatus by means of which bets have been or may be recorded or registered; any record ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering, pools, lotteries, numbers, policy, or similar games."

We note that possession of gambling paraphernalia does require proof of gambling paraphernalia while gambling promotion does not require such proof. Further, the element of possession is required in possession of gambling paraphernalia and not in gambling promotion. Thus, proof of additional facts would be necessary and possession of gambling paraphernalia cannot be a lesser included offense under Article 37.09(1), supra. See Graves v. State, supra.

Appellant's ground of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

(Delivered November 2, 1977)

UNITED STATES CONSTITUTION

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Exhibit B - 1